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No. 81-2362

In the Supreme Court of the United States

OCTOBER TERM, 1982

B.F. DIAMOND CONSTRUCTION COMPANY, INC., ET AL., PETITIONERS

v.

HOWARD LEMELLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether a worker injured on actual navigable waters while building a bridge designed to improve river navigation is engaged in "maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 674 F. 2d 296. The opinion of the Benefits Review Board (Pet. App. B-1 to B-34) is reported at 13 Ben. Rev. Bd. Serv. (MB) 542. The decision and order of the administrative law judge (Pet. App. C-1 to C-5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1982. The petition for a writ of certiorari was filed on June 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Howard LeMelle, an employee of petitioner B.F. Diamond Construction Company, was injured while constructing a bridge across the James River at Newport News, Virginia. The construction project involved demolishing an old bridge and replacing it with a new structure at the same location (Pet. App. A-3, B-5). On the day of his injury, LeMelle was working as a cement finisher on a fixed section of the new bridge, located approximately one mile from shore and eight to ten feet above the water (*id.* at A-3, B-3 to B-4). His job site could be reached only by boat and his work required him to be continually over the water (*id.* at A-3 to A-4, B-4). LeMelle was injured when 200-300 pounds of mixed concrete fell on him (*id.* at B-3).

LeMelle filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. IV) 901 *et seq.* The administrative law judge (ALJ) denied LeMelle's claim, holding that he was not a covered employee because he was not "engaged in maritime employment" as required by Section 2(3) of the Act, 33 U.S.C. 902(3). The ALJ's decision was based solely on a prior unreviewed ALJ opinion denying coverage to another of petitioner's employees working on the same bridge (Pet. App. C-3 to C-4).

LeMelle appealed to the Benefits Review Board, pursuant to Section 21(b)(3) of the LHWCA, 33 U.S.C. 921(b)(3). The Board affirmed the denial of benefits in a 2-1 decision, holding that LeMelle's bridge construction work did not constitute "maritime employment" because it did not have a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters" (Pet. App. B-4). See *Sedmak* v. *Perini North River Associates,* 9 Ben. Rev. Bd. Serv. (MB) 378, rev'd *sub nom. Fusco* v. *Perini North River Associates,* 601 F. 2d 659 (2d Cir. 1979), vacated and remanded, 444 U.S. 1028, aff'd on

remand, 622 F. 2d 1111 (1980), cert. denied, 449 U.S. 1131 (1981). The Board rejected LeMelle's argument that coverage was appropriate here because the bridge would actually aid navigation by allowing greater clearance for river traffic than the old bridge. While the Board noted that "documents admitted into evidence * * * indicate that the project was planned [in part] to improve * * * the navigation of the James River" (Pet. App. B-5), it nevertheless ruled that "a claimant engaged in bridge construction [is] not within the *Sedmak* definition of maritime employment, notwithstanding the fact that he [is] 'working on a portion of the bridge that was designed to avoid obstruction of navigation' " (*id.* at B-7; citation omitted).[1]

LeMelle sought review of the Board's decision in the court of appeals pursuant to Section 21(c) of the Act, 33 U.S.C. 921(c). The Director participated as respondent and filed a brief in support of LeMelle's petition for review. The court granted the petition and held that LeMelle was covered under the Act. The court reaffirmed its earlier decision " 'that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments' " to the Act (Pet. App. A-8, quoting *Brown & Root, Inc.* v. *Joyner*, 607 F. 2d 1087, 1090 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980)). "It is not necessary," the court

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[1]Board Member Miller dissented on several grounds. He relied in part on his view that all work performed over the water constitutes maritime employment (Pet. App. B-31 to B-32) and that employees covered before the 1972 amendments to the LHWCA, including bridge construction and demolition workers, remain covered under the amended Act as "maritime" employees (*id.* at B-20 to B-23). He also believed that, even if a "significant relationship to * * * navigation and commerce" is required, LeMelle would be covered because "[t]he clear and uncontroverted evidence is that the construction project was planned from the beginning with an intention to improve and increase navigation of the James River" (*id.* at B-26).

said, "to relate again the tortured history of employee coverage under the LHWCA, except to note that bridge construction and demolition workers employed over navigable water were covered prior to the 1972 amendments" (Pet. App. A-7 to A-8; citations omitted). For this reason, the court held that "the claimant, working over navigable waters on a bridge designed in part as an aid to navigation, is engaged in maritime employment" under the Act (*id.* at A-9):

> Although bridge demolition and construction is not classically maritime work under the "ancient traditions of the sea," it has long been merged with such work by the exigencies of modern coastal land and sea traffic. Essential to improving navigation and possessing many of the same hazards and working conditions as more traditional work on navigable waters, such employment carries with it the fundamental elements of what historically has been regarded as maritime employment.

DISCUSSION

The court of appeals correctly resolved the LHWCA coverage issue in this case. The court correctly held that a bridge construction worker who would have been covered prior to the 1972 amendments to the LHWCA and whose job on the water was traditionally viewed as maritime employment retained coverage under the amended Act. This ruling, however, conflicts with a recent decision of the Second Circuit that denies benefits to a marine construction worker who was injured on actual navigable waters. *Churchill* v. *Perini North River Associates*, 652 F. 2d 255 (1981), cert. granted *sub nom. Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, No. 81-897 (Feb. 22, 1982). Because of this conflict, we suggest that the Court hold this petition in abeyance, pending decision in the *Perini* case.

1. The decision below is correct for the reasons stated by the court of appeals. Bridge construction and demolition workers injured over actual navigable water were covered prior to congressional modification of the LHWCA in 1972. See *Davis* v. *Department of Labor*, 317 U.S. 249 (1942); *Hardaway Contracting Co.* v. *O'Keeffe*, 414 F. 2d 657 (5th Cir. 1968); *Peter* v. *Arrien*, 325 F. Supp. 1361 (E.D. Pa. 1971), aff'd, 463 F. 2d 252 (3rd Cir. 1972). The court below correctly concluded that " 'employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments' "(Pet. App. A-8 to A-9, quoting *Brown & Root, Inc.* v. *Joyner, supra*, 607 F. 2d at 1090).

As fully discussed in the Director's brief in *Perini*, Congress in 1972 moved the coverage of the LHWCA shoreward to include workers engaged in maritime employment who were injured on new, broadly defined "navigable waters" adjacent to the water's edge. 33 U.S.C. 903(a). The indisputable congressional purpose behind the 1972 amendments was to expand coverage "to protect *additional workers.*" S. Rep. No. 92-1125, 92d Cong., 2d Sess. 1 (1972) (emphasis added). The definition of covered employees under amended Section 2(3) "does not exclude * * * employees traditionally covered * * *." S. Rep. No. 92-1125, *supra*, at 16. Thus, a bridge construction worker injured on actual navigable waters, like LeMelle, remains covered as an employee engaged in "maritime employment." See *Boudreaux* v. *American Workover, Inc.*, 680 F. 2d 1034 (5th Cir. 1982) (en banc).[2]

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[2]Contrary to petitioners' argument (Pet. 4-5), Section 2(3) does not limit coverage to longshoring, harbor work and shipbuilding. The status provision defines a covered "employee" as "any person engaged in maritime employment, *including* any longshoreman or other person

2. Although the ruling below is correct, it conflicts with decisions of the Second Circuit that deny coverage to maritime construction workers injured over actual navigable waters. In *Fusco* v. *Perini North River Associates, supra,* 622 F. 2d at 1112-1113, the Second Circuit denied coverage to two workers engaged in constructing a sewage treatment plant on actual navigable waters. The court specifically rejected (*id.* at 1113) the argument adopted by the Fourth Circuit that " 'employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments' " (Pet. App. A-8 to A-9).

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engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *" (33 U.S.C. 902(3); emphasis added). Even assuming that a bridge builder does not qualify as a "harborworker," the specified categories are clearly not an exhaustive list of "maritime employment." See *P.C. Pfeiffer Co.* v. *Ford,* 444 U.S. 69, 77-78 n.7 (1979); *Trotti & Thompson* v. *Crawford,* 631 F. 2d 1214, 1220 (5th Cir. 1980).

Petitioners also contend (Pet. 8-11) that the court below exceeded its authority by overturning the Board's "finding of fact" that the bridge project on which LeMelle was working was not an aid to navigation. There is no merit to this contention. The court of appeals, correctly viewing the question before it as one of law, simply ruled that bridge construction, which traditionally had been considered to be maritime work and was covered before the 1972 amendments, retained its status as "maritime employment" under the amended Act (Pet. App. A-8). The court merely incorporated into this legal holding the undisputed fact that the bridge in question was designed "in part" to improve the navigation on the James River (*id.* at A-9). The Benefits Review Board itself emphasized that its resolution of the coverage issue in this case did not depend upon whether the James River bridge actually aided navigation. As the Board stated, "there are no factual issues at [*sic*] dispute in this case. Claimant was engaged in bridge construction. The issue is thus one of legal interpretation, *i.e.,* whether bridge builders are maritime employees within the meaning of Section 2(3)" (Pet. App. B-6 n.2).

In *Churchill* v. *Perini North River Associates, supra,* the Second Circuit relied on its ruling in *Fusco* to deny coverage to another marine construction worker even though that worker was injured while he was on a barge in actual navigable waters. In addition to arguing that Churchill was covered because he would have been covered before the 1972 amendments extended coverage under the LHWCA, the Director argued that Churchill was covered because his duties at the time of injury included the unloading of caissons and other material from supply barges. The Second Circuit, however, rejected these arguments and denied coverage.

On February 22, 1982, this Court granted the Director's petition for a writ of certiorari in *Churchill* v. *Perini North River Associates, supra.* That case presents the question whether "a marine construction worker injured while working on actual navigable waters is 'engaged in maritime employment' within the meaning of Section 2(3) of the [LHWCA]" (81-897 Pet. I). Because the resolution of that question will likely control or substantially influence the resolution of this case,[3] we believe that the Court should hold this petition in abeyance pending its decision in *Perini.*

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[3]If this Court holds in *Perini* that marine construction workers who are injured on actual navigable waters remain covered under the amended LHWCA, LeMelle unquestionably would be entitled to benefits.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates,* No. 81-897.

Respectfully submitted.

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